Before The
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Library of Congress
Washington, D.C.

In the Matter of Rulemaking	)	
Notice and Recordkeeping for Use of Sound Recordings Under Statutory License	)	Docket No. RM 2002-1B

COMMENTS OF COLLEGIATE BROADCASTERS, INC.

Collegiate Broadcasters, Inc. ("CBI") hereby respectfully submits these comments in response to the Notice and Recordkeeping for Use of Sound Recordings Under Statutory Licenses ("Notice"), published at 67 Fed. Reg. 59573 (September 23, 2002). The Notice requests written proposals with regard to the format in which recordkeeping data must be maintained by services and the method or methods of delivery of the data to the officially-designated receiving agent for statutory licenses under 17 U.S.C. §§ 112 and 114.

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CBI is an interested party in that it is an association of broadcasters and webcasters located across the country at the nation's universities and colleges. CBI has approximately 100 members, the majority of which, are now "webcasting" sound recordings, or have at one time or want to in the future "webcast" sound recordings.

As in CBI's previous comments before the Office, references to "EC Stations" in these comments include all educational and community stations that can demonstrate Federal non-profit tax-exempt status under 26 U.S.C. § 501(c)(3), which include "webcast only" operations that meet the above criteria. For clarification, stations that are part of government-operated learning institutions are also incorporated. Excepted are radio stations covered under the privately-negotiated Recording Industry Association of America/Corporation for Public Broadcasting/National Public Radio agreement ("RIAA/CPB Agreement"),

Background

CBI filed its initial comments concerning recordkeeping on April 4, 2002, and reply comments on April 26, 2002, as requested by the Office in its Notice of Proposed Rulemaking ("NPRM"), published at 67 Fed. Reg. 5761 (February 7, 2002). CBI also participated on the recordkeeping roundtable on May 10, 2002, in response to the request by the Office for participation by those affected by the proposed regulations as published at 67 Fed. Reg. 18148 (April 15, 2002).

In CBI's previous comments, reply comments, and the comments of others, specific testimony has been given concerning the nature of the EC Stations and how they differ from other services affected by the proposed recordkeeping regulations for statutory licenses under 17 U.S.C. §§ 112 and 114.

Discussion

In this section, CBI will discuss the need to consider comparable agreements, such as the RIAA/CPB agreement and follow such precedent. This discussion of the recordkeeping bears directly on the appropriateness of the rate determination. A full examination of the record will demonstrate that the Office has only partially recognized facts of record and their effects on EC stations. It is clear that the outcome of this process is likely to become effective after the conclusion of the current CARP and LoC effective dates for the rates and therefore should be moot. If the Office fails to recognize the record and proceed with this process, CBI has included specific comments on the format of reports of use, as requested in the Notice.

I. The Office Must Consider Comparable Voluntary Agreements When Determining Terms of Statutory Licenses, Including Reasonable Notice Requirements and Format

Congress specifically directed the Copyright Arbitration Royalty Panel ("CARP") to consider rates and terms associated with voluntarily-negotiated agreements when establishing those parameters for the statutory licenses.[1] Congress further mandated that "the copyright arbitration royalty panel shall establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller."[2]

The Office characterizes its current action as a request for information to be used to establish requirements by which copyright owners may receive reasonable notice of the use of their sound recordings, as specified under 17 U.S.C. §§ 114(f)(4)(A) and 112(e)(4). However, once the complexity of the proposed recordkeeping requirements and format rises to the level that the burden of compliance might force a service to cease webcasting on the Internet, the scope of the Office's actions clearly goes well beyond what was intended for the Office and reaches the level of very fundamental terms of the license that can only be established by the CARP and then adopted by the Librarian of Congress under 17 U.S.C. § 802(f). If the burden of recordkeeping requirements and format a willing buyer to reject a voluntary agreement, the recordkeeping is very well the type of license term Congress had in mind to be considered in arbitration. Therefore, the Office cannot now adopt recordkeeping regulations, including regulations as to format, which exceed what is reflected in the record as to the terms that a willing buyer and willing seller might agree upon.

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[1] 17 U.S.C. § 114(f)(2)(B)

[2] id.

The record of the CARP includes one such reference that bears directly on determining acceptable recordkeeping requirements and format for EC Stations. As noted in the final CARP Report, negotiations resulted in a settlement agreement between the Recording Industry Association of America ("RIAA") and National Public Radio ("NPR"), affecting the services of NPR, its member radio stations, and non-member radio stations which are eligible to receive federal funding from the Corporation for Public Broadcasting ("CPB"). Evidence of this accord is in the record of the CARP, as the report itself notes: "Pursuant to joint request of the parties, on December 20, 2001, the Panel issued an order to reopen the record for the limited purpose of admitting into evidence the agreed-upon terms."[3]

EC Stations not funded by CPB have fiscal constraints and other interests analogous to those of NPR and CPB stations. The Office cannot now adopt recordkeeping requirements, including the format for such recordkeeping, without considering comparable terms contained in the voluntary agreement already of record.

II. The Office Must Follow Precedent for Noncommercial Webcasters

A. Reporting For Small Noncommercial Webcasters Must Be Waived

Section 4.1(b) of the RIAA/CPB Agreement specifically requires reporting for programs simultaneously broadcast and webcast only for stations with ten (10) of more full-time equivalent employees. CBI hereby renews its contention that non-CPB educational stations and services must be exempted from the recordkeeping, when fewer than ten (10) full-time employees are engaged directly in station activities. The RIAA/CPB Agreement was accepted in into the record before the CARP.[4]

B. The Recordkeeping Burden Bears on the Appropriateness of the Rate Determination

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[3] CARP report at 17.
Rate Setting for Digital Performance Right is Sound Recordings and Ephemeral Recordings, Docket No. 2000-9, CARP DTRA 1 & 2 (2002), p. 17 (the "CARP Report").

[4] The RIAA has represented the negotiated settlement as a confidential agreement; however, the language of the "Express Prohibition on Disclosure of the Agreement, " Section 5.2 of the RIAA/CPB Agreement, is very limited in scope. The parties to the agreement specifically stipulated only that the RIAA/CPB Agreement would not be introduced in any proceeding "with respect to the rates, terms or reporting obligations to be established for the making of Ephemeral Phonorecords or the digital audio transmission of Sound Recordings under 17 U.S.C. §§ 112 and 114 and appropriate corresponding sections of the Code of Federal Regulations, whether such rates, terms or reporting obligations are adopted by a CARP, the Copyright Office or the Librarian of Congress." Parties to the RIAA/CPB Agreement are not globally precluded from disseminating the agreement to others, such as to CBI via a member station, but they are only enjoined from submitting the RIAA/CPB Agreement to the CARP, the Copyright Office, or the Librarian. Such a demonstrated action to clearly and deliberately thwart the expressed intent of Congress, which expected that comparable agreements would be reflected in the arbitration recommendation, must not be rewarded. Further, because CBI was not a party to the RIAA/CPB Agreement, the organization cannot be bound by the nondisclosure terms contained therein. The RIAA/CPB Agreement has been presented, in redacted form, to the four hundred ten (410) covered radio stations.

CBI, again, calls for the institution of a blanket royalty fee for EC Stations, because the recordkeeping established to comply with the adopted rate structure does not allow small noncommercial stations reasonable access to the statutory license, as required by Congress. The CARP and Librarian have heretofore wrongly disregarded the combined effect of the per-performance rate determination and the recordkeeping requirements seemingly necessary to support such a metric. In tandem, these decisions will most certainly cause small EC Stations to cease Internet webcasts, a result which has been abundantly established, yet ignored, in the record generated by the Office. The Librarian erred significantly when the impact of recordkeeping requirements for small webcasters was not factored into the final rate determination. The Librarian failed to adequately consider that the cost of recordkeeping for small EC Stations could easily exceed the royalty liability itself, likely the minimum fee adopted by the determination.

The RIAA/CPB Agreement is again a significant example of how a fixed royalty fee has been negotiated in the marketplace, thus negating the need for overly burdensome – or, in many cases, impossible – recordkeeping requirements. Even well-funded stations benefiting from the RIAA/CPB Agreement, such as WCAL at St. Olaf College, have ceased Internet streaming due to, among other reasons, "record-keeping and reporting requirements that far exceed our capabilities."[5] The 2000 annual operating budget for WCAL exceeded $2,000,000,[6] while EC Stations are characterized by operating budgets averaging just $9,000.[7]

III. The Instant Request Only Partially Recognizes Facts of Record

CBI recognizes that the Office has heeded, among others, its comments, reply comments, and live testimony concerning the ability of EC Stations to comply with the recordkeeping requirements as proposed in the earlier NPRM. This consideration is apparent by the likely interim requirements published in the instant Notice. There are, unfortunately two glaring omissions, which will preclude most EC stations for utilizing the statutory license.

A. Electronic Reporting Would Disrupt the Structure of EC Stations

The first omission becomes obvious when the Office, in its Notice, states that, "data must be maintained in electronic format for delivery to SoundExchange; data in hard copy format is not acceptable." As explained in testimony,[8] many EC Stations use pen and paper to document music playlists, if such records are even generated. Fewer than 10% have any form of electronic recordkeeping.[9] The requirement of the Office, as stipulated in the Notice, to electronically file

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[5] See http://www.wcal.org/programs/streamingannounce.html, visited September 26, 2002.

[6] See http://www.cpb.org/pdfs/salary/sal_radio.pdf, Appendix Table E, visited September 26, 2002.

[7] Recordkeeping Comments of Intercollegiate Broadcasting System, at p. 3.

[8] Recordkeeping Reply Comments of CBI at p 12, Recordkeeping Comments of College and University Broadcasters at p.10.

[9] CBI Recordkeeping Comments at p. 12.

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reports of use ignores the inability of these stations to comply.

Many EC stations report, that due to governmental or institutional guidelines many EC Stations cannot carry forward operating funds from one year to the next. Stations are not likely to have purchased any hardware or software at this point in time, because they could not reasonably anticipate the costs of these items when their fiscal requests were due in the last fiscal year. Indeed, the costs for compliance with recordkeeping requirements still cannot be accurately determined. Stations not already situated to provide electronic reports will need a significant amount of time, into the next fiscal year,[10] to respond to new recordkeeping requirements, if they will be able to comply at all.

Instructive are the requirements SoundExchange has imposed on record labels and artists seeking royalty distributions.[11] The total quantity of labels and artists likely to be seeking distributions is not insignificant. As RIAA's own numbers suggest, approximately 40,000 new recordings are released each year.[12] New releases, when combined with entire back catalogs of recordings, will result in massive quantities of total data fields from labels and artists. Yet, artists are allowed to submit entire catalogs of recordings with hard copy reports, although electronic filing is also permitted. SoundExchange cannot convincingly argue that hard copy reports submitted by EC Stations would be burdensome, while at the same time voluntarily accepting such reports from artists and record labels, large and small.

Additionally, the reporting requirement SoundExchange has implemented for record labels and artists is limited to specifying the data fields to be submitted, but does not mandate report formatting as is presently underway by the Office for the EC Stations. Also noteworthy is that the RIAA/CPB Agreement does not specify a format for reporting, even for those comparatively well-funded stations that must report at all.

Moreover, the dataset of copyright holders' catalogs that SoundExchange is now compiling includes only eight items of information for each recording.[13] Of these, one is optional and another can be an estimate. Thus, SoundExchange has determined that minimal data is necessary to adequately identify a specific work. Because this is the dataset that will be used to correlate with the data reported by the services, there is no need for the Office to contemplate requiring any additional information from the services – either in the short term for any interim recordkeeping requirements or in the long term for the eventual final recordkeeping requirements.

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[10] Most academic institutions operate with a fiscal year which begins on July 1; therefore, a majority of EC stations will not have new funding, with which to acquire any software systems or hardware necessitated by the yet-to-be-announced recordkeeping rulemaking, until some time after July 1, 2003, at the earliest. In many cases, acquisition funding might not be available to EC Stations until after the start of the academic year, likely to be September, 2003.

[11] See http://www.soundexchange.com/RA-005.pdf and http://www.soundexchange.com/RA-001.pdf, visited September 26, 2002.

[12] See http://www.riaa.org/MD-US-6.cfm, visited September 26, 2002.

[13] See http://www.soundexchange.com/RA-005.pdf, visited September 26, 2002.

B. Proposed Recordkeeping Requirements Are Not Compatible With Technology and Practices Used by EC Stations

A second omission by the Office, previously specifically addressed by CBI, is the failure to recognize the impossibility of reporting a specific number of listeners for each song.[14] In its request for comments, the Office specifically directed that "[p]roposals should include requirements that are or can be compatible with software used by webcasters in connection with programming or reporting of performances of sound recordings." The Office's own directive violates this specification.

Encoding delay inherent in digital streaming software results in a differential between the time a given sound recording is played back in a radio station studio and the time the encoded data departs the streaming server. Therefore, the sound recording "now" being performed, from the perspective of the webcaster, is most definitely different than the sound recording "now" being heard by the listener to the streamed programming. The Office has adopted regulations that define a reportable performance of a sound recording as "each instance in which any portion of a sound recording is publicly performed to a listener via a Web Site transmission or retransmission;"[15] however, the accurate direct correlation of streaming server access logs to any record generated by an unrelated system used to play back sound recordings is not at all feasible, because the length of the inherent encoding delay could be the major portion of a single recording. In the case of EC Stations that do not make use of computerized systems to store and play back sound recordings, the human factor of manually generating or entering a log of sound recording performances most certainly would accrue significant errors. In short, any provision that would require webcasters to report the exact number of listeners to any specific song would concurrently require many EC Stations to replace all studio and streaming technology presently in service, and would necessitate extensive restructuring of station operations.

Streaming servers for broadcast stations often are not collocated with performance studios, particularly in situations in which a webcaster utilizes the services of a contracted streaming provider. In these cases, the coordination of music performance logs and streaming server logs become even more difficult, even if technology in use would otherwise make such data sharing feasible. Additionally, the use of multicasting further inhibits a stations ability to collect data.

A survey conducted by CBI of EC Stations reflects that no station can presently comply with any requirement to accurately report listeners for each recording performed.[16]

To again reference the benchmark RIAA/CPB Agreement, stations covered by that accord

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[14] The Notice states that services will be required to report, "The total number of performances of the sound recording (i.e., the number of times the sound recording is performed multiplied by the number of recipients of each performance) during the relevant reporting period."

[15] 37 C.F.R § 261.2.

[16] EC Stations responded to a CBI survey conducted from via email, 9/18/02 – 9/23/02.

are not required to report listener numbers tied to any specific sound recording performed.[17] Under that agreement, listener data is reported separately from information identifying sound recordings. Indeed, listener data under the RIAA/CPB Agreement may be in the form of an estimate. Again, reporting for CPB-funded stations is only required for those stations characterized by ten (10) or more full-time equivalent employees. The disparity of the reporting requirements required for CPB-funded stations and the reporting requirements proposed for small EC Stations again emphasizes the pure folly of the underlying rate determination.

Many EC Stations broadcast third party network or syndicated programming where the station does not have the right or ability to control the programming and where information about specific musical recordings is not provided by the program supplier. The principle market for many of these third-party programs consists of the same CPB-funded stations exempted from reporting by the RIAA/CPB Agreement. Therefore, outside suppliers of programming for the broad range of noncommercial radio stations will have no incentive to alter establish practices by providing sound recording information to EC Stations.

IV. The Office Must Not Adopt Recordkeeping Requirements Specific to the Past CARP

Rates established under the past CARP, Docket No. 2000-9, extend only through December 31, 2002. The recordkeeping requirements now under consideration cannot reasonably be made effective until some time after that date. CBI recognizes that a final recordkeeping determination should not be further postponed until the completion of the subsequent CARP process, if any. Equally, the recordkeeping requirements now adopted must not favor the royalty model of the past CARP, since none of the data reported under the anticipated recordkeeping requirements will apply to performances under the present determination. Services and copyright holders have each appealed the existing determination by the Librarian. Clearly, evidence to be considered by any future CARP might well result in a royalty metric, or a combination of metrics more appropriate to distinct services, much different from the past determination, even if that determination stands.

Recordkeeping requirements now adopted, therefore, must not be predicated on issues specific to the past CARP. Emblematic of this concern is the intractable association of listener data to specific recordings discussed above. The requirement of such a connection could only be justified by a per-performance royalty. Even under this metric such accounting is not mandatory, as is evidenced by the allowed performance estimation that will stand for the entirety of the present per-performance-based determination.[18] Reporting listener statistics in the aggregate should be allowed going forward, just as this practice is allowed for historical performances.

As the Office further develops this recordkeeping rulemaking, consideration must be given to ensure that any unannounced requirements likewise are not based solely on the past royalty

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[17] RIAA/CPB Agreement, at Section 4.1(b).

[18] 37 C.F.R. § 261.3(b).

determination.

V. Proposed Recordkeeping Format

A. Electronic Reporting With Hard Copy Option for EC Stations

Failing the Librarian's recognition of a properly-applied reporting exemption for small EC stations, as justified by the RIAA/CPB Agreement, CBI continues to contend EC Stations should be permitted to optionally report sound recordings in hard copy form, per the established practice under 37 C.F.R. § 253.5. As for any argument that such a provision might create a hardship for the copyright owners, this concern has no more vitality for the sound recording owners than it would have for composition owners. Just as the Office has instituted regulations allowing hard copy reporting of performances of compositions by EC Stations, the Office must now permit hard copy reporting for sound recording performances by these same services.

B. The Office Must Not Adopt a Software-Specific Recordkeeping Format

In order to ensure that obstacles for entry remain as low as is absolutely necessary to minimally achieve the public interest of the statute, any recordkeeping format adopted must not require the acquisition by the services of any proprietary software or hardware. CBI therefore favors a required electronic reporting specification of the basic 8-bit US-ASCII repertoire. However, CBI welcomes any permissive language that also allows reporting to be optionally submitted in more sophisticated ASCII formats (e.g., UTF-16) or in other readily-available software applications, such as in a commonly-used spreadsheet form.

C. Services Should Not Be Required to Redundantly Report Data

Contrary to the example used by the Office for illustration in the Notice, CBI maintains that data not specific to individual recording performances should only be reported once, as part of the header of either the electronic or hard copy report. Such header information would include the name of the service submitting the report, the transmission category of the service, and perhaps the date range of the report sample. Aggregate tuning hours might also be listed in the report heading, although a separate reporting of aggregate listening might be alternatively considered. In the case of electronic reports, a provision to report redundant information only once would reduce the resulting file size, which could become a burden for both the services and the copyright holders, particularly should reports be retained for a number of years. Further, such identifying information is more appropriately included in the content of the report, in contrast to requiring identifying information as part of the file name as illustrated in the Notice example.

D. Field Names Might be Useful

CBI does not object to including field names as an additional line in the report header. Such a provision could prove informative when reviewing historical reports should the data reporting requirements change at some future time. Such information could be used to resolve any confusion regarding the order of the information reported and would obviate the need to specify field order. This information could also be used to facilitate importing report data into other software applications.

E. Date Records Should Follow Established Convention

Unlike the example provided in the Notice, date records should follow established logging conventions and begin with the 4-digit year, to be followed by the 2-digit numerical month, and finally the 2-digit day. CBI would agree to a date format otherwise similar to the Notice example, or to a W3C compliant field for date information. Such a specification would record dates in the format YYYY-MM-DD, where YYYY, MM and DD stand for the numeric year, month and day respectively.

F. Methods of Delivery Should Allow for Electronic Delivery

Hard copy reports should be delivered via first class mail or other standard physical delivery method. Services may send the reports, at their option, in a form which would require that SoundExchange acknowledge the receipt of reports of use.

In addition to physical delivery on a standard machine-readable medium, such as diskette, optical disc, or magneto-optical disc, electronic reports should also be permitted to be submitted via electronic mail or File Transfer Protocol ("FTP") to an Internet service provided by the designated collecting entity. Electronic delivery to the designated collecting entity should also require an acknowledgement of the receipt of reports of use.

G. Services Using Only Section 112 Licenses

Because EC Stations will each make use of Section 114 licenses, CBI offers no opinion on reporting requirements for services exclusively utilizing Section 112 licenses.

H. Specific Regulatory Language for Reporting Format

Format. A Report of Use should be provided in physical form on a standard machine-readable medium, such as a diskette, optical disc, or magneto-optical disc. Alternatively, a Report of Use may be delivered electronically to the designated collecting entity. Except that a hard copy Report of Use may be submitted in physical form for a Noncommercial radio station which is licensed to a school, college, university, or other nonprofit educational institution and which is not qualified to receive funding from the Corporation for Public Broadcasting pursuant to the criteria established in 47 U.S.C. § 396, and for any unlicensed nonsubscription radio station officially sanctioned and operated by a school, college, university, or other nonprofit educational institution and which is qualified for exemption from Federal income taxation under 26 U.S.C. § 501(c)(3). Each Report of Use should conform as closely as possible to the following specifications:

(1).....

(2).....

(i) 8-bit US-ASCII delimited format, using pipe characters as delimiter;

(ii) The first row of the report must include, in order, the name of the service submitting the report, the transmission category of the service, aggregate tuning hours for the report period, the beginning date for the report period, and the ending date for the report period;

(iii) The second row of the log must include the field names, consisting of the Recording Artist, Recording Title, Album Title, and Marketing Label;

(iv) The third and subsequent rows of the report must include records for each sound recording transmitted;

(v) Dates should be indicated by: YYYYMMDD, where YYYY is the four-digit year of the report period, MM is the two-digit month of the report period, and DD is the two-digit day of the report period; single digit days and months should be prepended with a zero;

(vi) A carriage return should be at the end of each line;

(vii) All data for one record should be on a single line;

(viii) All data for each month should be contained in a single report; and

(ix) Electronic report files may be compressed in .zip, .tar, or .gz format.

Conclusion

Recordkeeping requirements ultimately adopted by the Office must not extend in scope beyond the terms of licenses contemplated by the CARP and adopted by the Librarian. Likewise, recordkeeping requirements must not ignore comparable agreements negotiated in the marketplace. Regulations must not inappropriately force standards on services. Rather, the Office must adopt recordkeeping requirements, including specifications of format, appropriate for each of the disparate services making use of the statutory license. EC Stations exhibit characteristics which demonstrably deserve distinct consideration in this rulemaking process.

Respectfully submitted,

Collegiate Broadcasters, Inc.

September 30, 2002

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Appendix 1

Declaration of William C. Robedee

I, William C. Robedee, declare as follows:

1. I am making this declaration in support of the motion for a stay of the Librarian of Congress's Order. Except as stated, I have personal knowledge of the facts in this declaration and could testify competently to them in a court of law.

2. I am the General Manager of KTRU-FM 91.7, a broadcast and Internet radio station operated by Rice University in Houston, Texas. KTRU's mission is to educate the station membership, the greater Houston community and the students of Rice University in the spirit of the station's noncommercial educational license. I became the first professional manager of this student station in 1998. Since then I have, with students, planned and implemented KTRU's webcasting program.

3. I have been involved in college radio, in various capacities, since I was a student disk jockey in 1984 and have worked in radio station management since 1987, when I received a BA in Broadcast Communications from the State University of New York, New Paltz. I have written about college radio for College Broadcaster, the Journal of College Radio, and Radio World, and have been a delegate and frequent speaker at the national conventions of the National Association of College Broadcasters (NACB), Intercollegiate Broadcasting System (IBS) and Collegiate Broadcasters. A copy of my resume is attached as Exh. A to this Declaration.

4. I am also the Vice Chairman of Collegiate Broadcasters, Inc. ("CBI"). Founded about four years ago, CBI is a nonprofit organization of about 100 members who are college radio, television and Internet broadcasters. We have an annual fall convention to discuss common issues and problems in college broadcasting. As Vice Chairman of CBI, I am knowledgeable about the needs and concerns of our member stations. Primary among these concerns is that the royalty rates and fees in the Librarian's order are prohibitive for college radio stations that are not Corporation for Public Broadcasting ("CPB") qualified. These rates and fees have caused and will continue to cause irreparable harm to such stations.

5. For some schools, webcasting is the only viable way to reach an audience of any size, due to limited broadcast spectrum or fiscal constraints. Low power FM, cable FM/TV, legal and unlicensed AM, and cafeteria public address broadcast systems all have extremely limited audience potential, a problem solved perfectly by webcasting.

personnel management, fiscal management, event and programming promotions, sales, time management, technological exploration, asset management and networking. KTRU's student programmers get involved in the local music scene by, for example, putting on concerts by local musicians and lesser known artists who are on tour. Webcasting offers students a whole new set of tools to use to reach an audience. The interest in streaming has led students to work more attentively on KTRU's web site and to offer new features. Learning to develop and implement those tools is a great educational experience for the students.

11. Student-operated stations tend to program music to an audience- namely college students, teenagers and young adults --that is likely to purchase music recordings. Exposure to music recordings drives music sales, so educational and college stations help the artists whose recordings they play. This is especially true of local music, which gets little, if any, exposure anywhere else. Without a stay, the public will be irreparably harmed by the loss of diversity and choice in listening.

12. To the best of my knowledge, no college station is streaming perfect copies of sound recordings. All streaming formats use "perceptual based coding" to compress digital files for streaming. This means that even at very high bit rates, the reproduced audio is never CD quality. The sound quality from KTRU's streams is inferior to the sound quality received via FM radio.

13. Most CBI member college radio stations, unlike public radio stations funded by CPB, have to pay their operating costs from student fees or from their meager academic budgets. According to Intercollegiate Broadcast System ("IBS") surveys, the average college station budget is about $9,000.

14. KTRU is funded from student activity fees paid by about 2600 undergraduates studying at Rice. KTRU's budget for 2002-2003 is $14,000. KTRU expects to bring in an additional $5,600 per year for the next two years from an arrangement to broadcast Rice athletic events. But these funds have to cover broadcasting equipment, maintenance and repairs on equipment, music licenses, office supplies, office furniture, postage, production of training manuals, subscriptions to trade journals, telephone services, promotions to get listeners and volunteers, music recordings and various other incidental costs.

15. Historically, noncommercial radio stations have always paid copyright royalties to the Performing Rights Organizations in the form of a reasonable flat fee, while commercial stations have paid on a percentage of revenue basis. This has enabled college stations to operate on fixed budgets and avoided penalizing them if they succeed in reaching a wider audience.

16. KTRU did not participate in the CARP proceedings. In 1999, when the proceedings began, very little information was available about the royalty

arbitration process. By calling around to others in the nonprofit radio community, I learned that the cost of participation would be beyond the means of KTRU. In fact, I have since heard reports that the cost of participation was least $300,000, and could be as high as $1,000,000.00. This is far beyond the resources of KTRU, or indeed of any college station of which I am aware, and even beyond the resources of CBI. As a result, college stations that are not funded by CPB were simply not represented in the CARP proceedings at all.

17. Among the parties that did participate in the CARP hearings, NPR is the party that has most in common with college radio stations such as KTRU. Like NPR, CBI college stations are non-commercial and have no revenues from broadcast advertising. Unlike CBI college stations, however, NPR, because of its size and resources, was able to negotiate a rate and royalty agreement, which I understand was part of the CARP record. While I do not know the terms of this agreement, it is evidence of the rate a willing buyer and willing seller would agree upon for webcasting royalties-evidence that was not considered by the CARP or by the Librarian.

18. KTRU can afford to pay the back royalties due October 20. But going forward, KTRU may not be able to pay both the royalties, especially as its audience increases. KTRU reaches an average of 10-15 Internet listeners at any one time. But our Internet audience has been doubling every ten months, as more people get high speed Internet connections and listeners discover KTRU through "surfing" and promotion. While this is great for the students, who are reaching a wider audience, and for artists, who gain more exposure, it means even if we can afford to webcast today, ten months from now we could find ourselves with a bill we can't afford to pay. It does not make sense to encourage students to succeed if the outcome of their success-reaching a larger audience- causes them to be penalized with higher fees while they are providing a non-commercial, non-profit, educational service.

19. The royalty rates and minimum fees are especially prohibitive in light of the extra costs that stations also will have to incur to comply with the record keeping requirements, as described in the Copyright Office's Notice of Proposed Rulemaking dated February 1, 2002. The cost of complying with these requirements would far exceed the fees themselves at most college stations.

20. Many educational and community stations do not have the computerized systems generally found in commercial stations and CPB-funded stations that would allow for the automation of record keeping tasks required by the proposed record keeping requirements. Because many educational and community stations are multi-formatted, the sheer number of different recordings played is immense, compared to those of tightly formatted commercial stations. College station libraries, accumulated over many years, include tens of thousands of compact discs and albums that continue to be

played. These are often not already cataloged in computer databases- nor are recordings that students use from their own music collections. The cost of inputting the data required by the proposed record keeping rules would be enormous and extremely time-consuming. Many educational and community stations are staffed principally or exclusively by volunteers. The volunteers at our stations are already donating their time, energy and in some cases fiscal resources, to produce their programs. To expect volunteers to contribute countless additional hours to input the data needed to comply with record keeping requirements would be unreasonable and impractical for KTRU and many of the other college stations.

21. Another problem is the cost of the yet –to- be-developed software and computer hardware acquisitions necessary to comply with the record keeping requirements. Even if there were a technological solution, it would be prohibitively expensive for us to purchase it. For instance, the RIAA has suggested that a company called Webaound could provide record keeping services, but their fee is $100 per month-many times the dollar amount of royalties most college stations will owe. This is beyond the means of KTRU and most college stations. Moreover, Webaound developed their product for webcasters that use automated playlists with music files stored on computer hard drives. They cannot currently address the specific needs, due to logistics, live data input and timing issues, unique to a live student-operated radio station.

22. I started the Save Our Streams grassroots campaign and set up a website at www.rice.edu/eh/sos in order to track the issue of the new webcasting regulations, royalties and fees being promulgated under the DMCA and also to track the resulting impact on college radio stations. With other professionals in the field, I wrote a position paper, attached as Exh. B, posted it on the Save Our Streams website and asked readers to e-mail me expressing their support.

23. I have personally confirmed, by visiting their websites, that the following educational and community stations have stopped webcasting and have not resumed: I-Radio-TX; 90.0 FM "The Hive"; WSOE-NC; WMHB-ME; KTSC-CO; WRVG-KY; WMSS-PA; KPNI-TX; WVUA-AL; KTAI-TX; KEOM-TX; The VOICE-CA; UCLA Radio-CA; KKUP-CA; WTXR-GA; KNHC-WA; KMIH-WA; KAPU-CA;WMUA-MA;WEBR-VA; WDCB-VA 106-VIC-NY; WICB-NY; 89.1 The Point-NY; WETD-NY; WRUR-NY; KACS-WA; WESS-PA; WCLH-PA; WVKR-NY; WSWI-IN; WZBC-MA; KWJC-MO; WISU-IN; WERS-MA; WCLH-PA; KOFK-OK; KUPS-WA; WRSU-NJ; WNTI-NJ; WSUM-WI; WWSP-WI; WFHB-IN; WSTB-OH; WKTZ-FL; WONB-OH; WXOU-MI; WZND-IL; WZIP-OH; WUTK-TN; KBTR-TX; WSBF-SC; WRMC-VT; KSDS-CA; WNYU-NY; WSUW-WI; WEVL-TN; KRCL-UT; WSRN-PA; KXCI-AZ; WUVT-VA; WRUI-RI;

WPTS-PA; KBCS-WA; WMHW-MI; WSDP-MI; KKUP-CA; KBVR-OR; KXRJ-AR; WDWN-NY.

24. I have also heard reports from credible sources that many more college stations, in addition to those listed above, have also ceased webcasting, as a result of the Librarian's Order.

25. Radio enthusiasts at other colleges, such as the University of Texas at Dallas, have told me that they had plans to start webcasting, for much the same reasons as KTRU, but reluctantly suspended these when they learned of the CARP's recommendation, because they cannot afford to webcast under the rates and fees in the Librarian's Order.

26. As a result of using the SOS page to solicit support, I have received about 1400 e-mails in support of the position paper since December 15, 2001. I sent a reply to every such e-mail, in part to verify that it was really from the e-mail address in the "from" line. True copies of some of these e-mails are attached as Exh. C. They come from all around the country and from listeners in foreign countries who rely on Internet radio to hear American music. Many of these listeners say they have no other access to certain kinds of music. Others are housebound and use Internet radio as their link to the outside world. Still others use Internet radio to hear their far away loved ones who are student disk jockeys. Additionally, US troops stationed abroad have expressed concern at losing one of their ties to home. All of these listeners, and others like them, are suffering and will continue to suffer as a result of the rates and fees mandated in the Librarian's Order. A stay would serve the public interest.

27. In July, Congressmen Jay Inslee, Rick Boucher and George Nethercutt introduced H.R. 5285, the Internet Radio Fairness Act ("IRFA"), intended to help webcasters by creating an exemption from rates and fees set by the Librarian's July 8 2002 Order for transmissions by "small entities" until new rates can be determined under a different directive including factors other than the willing buyer/willing seller determination. KTRU and most other college stations are operated by colleges and universities that do not qualify as "small entities," but I am urging CBI members and supporters of Internet radio to ask their elected representatives to support IRFA with amendments to cover educational webcasters. Even if such legislation passes, however, an entire semester or more will likely have passed. Those semesters will be gone forever, so the harm to current students who want to participate in webcasting, at colleges whose stations have ceased webcasting, never started to webcast or have any kind of radio station at all, will be irreparable.

28. I have tried to negotiate with SoundExchange and RIAA for a royalty rate for educational stations that we could afford. I initiated a meeting with John Simson of SoundExchange and Steven Marks of RIAA, which took place on July 16, 2002. In that meeting, they told me and Joel Willer that they would not negotiate with us while they were negotiating with commercial webcasters. Their counsel had previously contacted me to discuss record keeping, but they were unresponsive to our attempts to negotiate royalty rates or reasonable recordkeeping for all of CBI members and, in particular, the unlicensed stations. Even if we are ultimately able to reach an agreement, time will have passed and the harm to current students and the public will be irreparable.

29. A stay is desperately needed so that student webcasters can continue to make their unique contribution to the performance of copyrighted works in the digital domain.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on September 20, 2002 in Houston, Texas.

William C. Robedee

Declaration of Joel R. Willer

I, Joel R. Willer, declare as follows:

1. I am making this declaration in support of the motion for a stay of the Librarian of Congress's Order. Except as stated, I have personal knowledge of the facts in this declaration and could testify competently to them in a court of law.

2. I am an Assistant Professor of Mass Communications and Faculty Supervisor of student-operated radio station KXUL at the University of Louisiana at Monroe ("ULM"). I additionally serve as an Associate Member of the ULM Graduate Faculty. I have been employed as a faculty member of institutions within the University of Louisiana System since 1982. I have been responsible for the supervision of KXUL radio since 1985.

3. I first became involved in student radio in 1977, at Kent State University's unlicensed carrier current station WKSR. My work with student radio has continued for more than two decades. I have been selected by College Media Advisers ("CMA") as the 2002 Distinguished Broadcast Adviser honoree representing four-year institutions nationwide. In 1999, I received a CMA presidential citation for "outstanding service to CMA and to student media across the nation." I formerly served on the Executive Board of Directors (1995) and the Faculty/Staff Advisory Board (1996-1998) of the National Association of College Broadcasters ("NACB"). I have been a frequent presenter at national and regional college media conferences for NACB, CMA, and Collegiate Broadcasters, Inc. ("CBI"). I have written for or have been cited in periodicals and books such as College Broadcaster, The Journal of College Radio, College Media Review, Feedback, The Culture of American College Radio, The SPLC (Student Press Law Center) Report, Current, Chronicle of Higher Education, Radio World, Los Angeles Times, and Salon.com. A copy of my academic vita is attached as Exhibit 1 to this Declaration.

4. ULM is a regional four-year state-assisted public university located in the northeastern portion of the state of Louisiana, offering a broad array of academic and professional programs through the doctorate degree. KXUL, a non-commercial educational radio station, obtained its first broadcast license from the FCC in 1973. KXUL is staffed principally by student and community volunteers and is administered by the academic Department of Communication within the university's College of Arts and Sciences. Mass Communications students may receive academic credit for their involvement with the radio station. ULM is accredited at the institutional level by the Southern Association of Colleges and Schools ("SACS") and the ULM Mass Communications program is accredited at the departmental level by the Accrediting Council on Education in Journalism and Mass Communications ("ACEJMC").

5. Funding for the operation of KXUL is derived exclusively from student fees levied by a popular vote of ULM students; KXUL receives no federal funding from the Corporation for Public Broadcasting ("CPB"). A Mass Communications faculty member serves as the station's supervisor, and the university provides the services of a part-time engineer to maintain the KXUL technical facilities. A small number of student staff members receive part-time work-study wages. KXUL has no full-time employees.

6. A 1999 ACEJMC accreditation report listed among the strengths of the ULM Mass Communications academic program an "[o]utstanding student radio station." The accreditation report also generally recognized the value of students' co-curricular involvement with KXUL to augment classroom instruction.

7. KXUL launched its first Internet site in 1996. In 2001, KXUL received a first place national award from the Interactive Multi-Media Division of the Broadcast Education Association ("BEA") juried faculty competition, with additional Exceptional Merit recognition for online interaction.

8. Student-operated radio station KXUL, licensed at that time with the call letters KNLU, began retransmitting its over-the-air programming via Internet webcasting on July 2, 1998, utilizing free streaming software from RealNetworks, Inc. The station added a second audio streaming service utilizing a newer version of RealNetworks' free server and encoder software on June 6, 2000. A third streaming format, Windows Media, was added by KXUL on January 24, 2001, utilizing server software bundled with the academic version of the Windows 2000 Server operating system. None of the streaming technologies utilized by KXUL readily allow for listeners to copy programming KXUL provides to them.

9. Students must have exposure to the use of new technologies to gain a thorough understanding of mediated communication. Students' experience gained as the result of KXUL radio's Internet presence and the station's streamed audio programming is therefore a vital part of the students' complete education. Likewise, KXUL's Internet outreach makes the radio station's programming available to a worldwide audience that would not otherwise be able to experience the messages communicated by our students. KXUL has received numerous communications from listeners throughout this country, and has logged listening sessions from 53 nations outside of the United States.

10. KXUL views the use of digital technology to retransmit the programming of non-commercial radio stations as a natural extension of these stations' historical service. Noncommercial educational radio stations traditionally strive to program to otherwise underserved audiences with content not typically provided by their commercial counterparts. The further distribution of educational and cultural programming via the Internet allows noncommercial radio stations to effectively extend their public service to a geographically-diverse audience. The Internet removes the physical boundaries imposed by an educational radio station's terrestrial radiofrequency transmission, allowing a greater audience to experience each noncommercial station's programming. The Internet began, in part, to support education; the continuing use of the Internet by noncommercial educational radio stations respects that tradition.

11. Internet audio streaming not only allows KXUL to deliver its programming to listeners beyond the station's over-the-air broadcasting area, but this service also allows the station to better reach listeners within the station's immediate area. For example, for each year during the period between October 28, 1998, and August 31, 2002, Internet audio delivered to the corporate offices of Century Telephone Enterprises, Inc., located approximately 6.75 miles from the KXUL transmitter site, represented from 6-13% of the station's total Internet tuning hours.

12. KXUL, like the majority of college radio stations, cannot afford to purchase, itself, Internet bandwidth necessary for streaming audio. Instead, the station makes use of excess bandwidth provided by the University through a statewide network of government agencies. The number and quality of Internet audio streams KXUL can offer is restricted because of this limited network bandwidth. To maximize the service we are able to provide to our audience through this finite resource, we have deliberately restricted the bandwidth capabilities of each of our streams. As result, the audio quality of our Internet stream is lower than that received by tuning in to our FM station.

13. Two of our three streaming platforms can only provide Internet audio at a single bandwidth setting each. Because we know that many of our listeners do not have access to wide-bandwidth connections, we have purposefully limited our audio streams to bandwidth requirements suitable to the lowest quality level, typified by listeners utilizing dial-up Internet connections. The resulting delivered audio is in no way a perfect copy of the original source recording.

14. KXUL was not represented in the CARP proceedings. The first I became aware of the online music issue related to the Digital Millennium Copyright Act ("DMCA") was in late 1999, when the broadcast trade press first publicized the need for non-subscription services to file with the Librarian of Congress the "Initial Notice of Digital Transmissions of Sound Recordings Made under Statutory License." KXUL prepared the notice on November 29, 1999, as soon as I became aware of the issue. The Copyright Office copy of that notice, filed under the station's former KNLU call letters, bears the stamped "Effective Date" of December 7, 1999. As of the date of this writing, radio station KXUL has received no communication from the Librarian of Congress, or from any others, as a result of filing the "Initial Notice of Digital Transmissions of Sound Recordings Made under Statutory License."

15. By the time I became aware of the statutory license under the DMCA, I was to later learn, the voluntary negotiation period had already lapsed and the Recording Industry Association of America ("RIAA") had petitioned the Librarian of Congress to commence the Copyright Arbitration Royalty Panel ("CARP"). At the same time that I first learned about the DMCA statutory license, I also was informed of a motion for declaratory judgment filed in the U.S. District Court for the Southern District of New York by the National Association of Broadcasters ("NAB"), seeking a ruling that transmissions of a broadcast signal over a digital communications network, such as the Internet, are exempt from copyright liability under section 114(d)(1)(A) of the Copyright Act. KXUL, like many non-commercial educational broadcasters with limited financial and human resources, was compelled to rely on the better-funded efforts of others and to await the final outcome.

16. College webcasters generally expected the webcasting royalty rate decision would look very much like previous rate determinations for noncommercial statutory licenses for underlying musical compositions. Noncommercial broadcasters' statutory licenses for musical compositions have always been based on a blanket fee, not on a per-performance royalty.

17. The station also lacks the substantial finances necessary to participate in the rate arbitration proceeding, even if we had learned of that process in a timely manner. Despite Congress' intent to provide the opportunity for all entities performing sound recordings to participate in the CARP hearings, in reality not all that wished to participate could. As a result, the CARP did not hear testimony about the characteristics of college stations.

18. The CARP report notes that a confidential agreement between National Public Radio ("NPR") and the RIAA was made part of the record. This Agreement affects only the services of NPR, its member radio stations, and non-member radio stations which are eligible to receive federal funding from the Corporation for Public Broadcasting ("CPB"). College stations not funded by CPB, however, have similar fiscal constraints and other interests similar to those of NPR and CPB stations. While the rates in this agreement are confidential and thus unknown to me, the Agreement is evidence that a willing seller and willing noncommercial station buyer would agree to 1) a blanket license, 2) a different rate for noncommercial stations than for commercial webcasters, and 3) reduced recordkeeping requirements.

19. The Librarian's final decision seemingly values Internet performances of sound recordings several orders of magnitude greater than over-the-air performances of musical compositions. International media research firm Arbitron estimates that, as of fall 2001, KXUL's Average Quarter Hour ("AQH") audience measures 600 persons (Monroe, Louisiana Total Survey Area; Persons 12+; Monday-Sunday; 6 a.m.-Midnight). If KXUL attracted the same size audience to its Internet retransmissions as it does over the air, the digital rights fees adopted by the Librarian for KXUL would total $13,724.47 per year. The annual statutory performance royalty fees for the underlying compositions of these same recordings, as established in other proceedings by the Librarian of Congress, total just $673.00. For the calendar year 2001, KXUL's average Internet audience was just 0.77% of the station's over-the-air audience, yet the minimum sound recording performance fee ($500.00) is 74% of the total statutory musical composition license fees for noncommercial broadcasters ($673.00).

20. The $500 minimum fees in the Librarian's Order mean that most noncommercial college webcasters will effectively be paying higher per-performance royalty rates than the commercial webcasters for their actual webcasts of copyrighted works.

21. KXUL's performance and ephemeral copy royalty liability for the last 65 days of the year 1998, under the Librarian of Congress's nominal rate table, totals just $3.71. Yet the station apparently will be required to pay the "minimum fee of $500 for each calendar year, or part thereof, in which it makes such transmissions or recordings" [37 CFR § 261.3(e)(1)]. The station's effective royalty for the calendar year 1998 will therefore be 2.672¢ per song performed, or 13,359% of the nominal statutory rate adopted by the Librarian for retransmissions by noncommercial radio stations, or 3,817% of the nominal statutory rate adopted for all commercial webcasters.

22. KXUL's nominal royalty for the 2001 calendar year, the station's peak listening period, totals $105.78. Because KXUL will be required to disburse the minimum fee, the station will pay an effective per-performance rate for 2001 of 0.09381¢, or 469% of the nominal noncommercial rate and 134% of the nominal commercial rate. Absent a stay, on October 20, 2002, radio station KXUL will have to make payment to RIAA's SoundExchange division for all past performances between October 28, 1998, and August 31, 2002. Because of the effect of the minimum fee, that payment will be $2,500.00, although KXUL's performance and ephemeral copy royalties for the period total only $214.86.

23. Another reason college webcasters will be harmed by the Order is that it is impossible to accurately measure the number of performances per listener. The Order bases royalty payments on the number of performances, which is defined as "each instance in which any portion of a sound recording is publicly performed to a listener via a Web Site transmission or retransmission (e.g., the delivery of any portion of a single track from a compact disc to one listener)." Webcasters like KXUL can technologically only measure Internet streaming connections, not listeners.

24. For each and every month spanning the past two years KXUL has experienced one or more streaming sessions extending for at least 24 hours. Eighty-eight percent of the past 24 months had at least one session lasting more than 36 hours, 46% of the months had at least one session lasting 48 hours, and so forth. Indeed, one month for which KXUL will soon have to pay retroactive royalty fees recorded a single session lasting 143.95 hours, or six straight days. Because a streaming client is connected to the station's streaming server does not necessarily mean anyone is listening. A few marathon connections like these each month dramatically and unfairly skew the performance numbers in favor of the copyright owner and against the webcasters. As more and more consumers subscribe to cable or Digital Subscriber Line ("DSL") "always on" Internet services, this phenomenon will only worsen.

25. Although the Librarian of Congress has not issued final recordkeeping regulations, the earlier Notice of Proposed Rulemaking and more recent Copyright Office staff comments have indicated that expectations will exceed the capabilities of KXUL to comply. Even though KXUL is more technologically advanced than many college radio stations, the station would not be able to meet the likely recordkeeping requirements without significant financial expenditures, which are not in proportion to the value of the works licensed. Indeed, some of what the Copyright Office has indicated will be required is technologically impossible for the station to provide at any cost.

26. These recordkeeping requirements are inextricably intertwined with the more general issue of the royalty fees, and are as likely to cause KXUL and its student broadcasters damage by forcing the station to cease its Internet service.

27. By my calculations, individual recording artists will not see much compensation as a result of the royalty rates imposed on college stations. KXUL makes extensive use of computerized tools in its programming, compared with most college stations. Accordingly, I have accurate statistics available to me about what specific recordings are played and how often. We keep such data only a short time due to storage space limitations, but an analysis of one week's data is illustrative. Based on a random week's data the average title played by KXUL is played 1.17 times a day. Comparing this number to the total number of daily performances, using the Librarian of Congress's estimation method, shows that the average song represents 0.406% of KXUL's airplay. Without accounting for administrative costs deducted by SoundExchange, the average song aired on KXUL would generate only $2.03 annually in royalties for the sound recording, even though KXUL's royalty payment will have been magnified significantly by the effect of the $500.00 minimum fee. Of that, $1.02 would be distributed to the recording label, $0.91 to the featured artist, and $0.10 collectively to the non-featured musicians on the recording. In reality, these figures would each be reduced by the amount kept by SoundExchange for administrative costs. Estimating that there are 500 college webcasters nationwide, the featured artist would collect just $456.75 annually for the average recording receiving college radio airplay. The non-featured musicians would receive $50.75 collectively for each such recording.

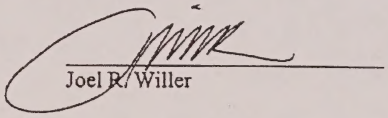
28. These estimates must be adjusted downward to reflect that 1) college radio playlists are generally even more diverse than KXUL's playlist; 2) stations paying the minimum annual fee rather than the actual royalty liability inflate the total; 3) actual royalties distributed will be reduced by SoundExchange administrative costs; and 4) those records that, unlike the average, receive only a few spins on a station or stations.

29. Many record labels give KXUL free recordings to encourage students to play them. A sample of e-mails from labels and bands seeking airplay or offering on-air interviews on KXUL is attached as Exhibit 2 to this declaration. I conclude from these facts that the value of promotion from airplay on college webcasters is worth more to the average record label and artist than a trifling $2.03 in royalties.

30. On July 16, 2002, I met with John L. Simson, Executive Director of RIAA's SoundExchange division, and Steven M. Marks, RIAA Senior Vice President for Business and Legal Affairs, to discuss the possibility of a negotiated agreement to cover webcasting royalties for college webcasters. These meetings were arranged as a result of the initiative of William C. Robedee, and took place in the RIAA's Washington, DC offices. These recording industry representatives told us the organizations they represent will not enter into negotiations with noncommercial college webcasters unless and until a negotiated agreement is reached with commercial webcasters. As of this date, I have personally had no further communication with any representative of the copyright holders.

31. A stay of the Librarian of Congress' rate determination and accompanying recordkeeping regulations is necessary to ensure the continuation of the Internet audio services provided by KXUL and its student broadcasters. The loss of this outlet will irreparably harm the students participating, audience members now able to listen to the station exclusively through the Internet, and recording artists benefiting from increased exposure through KXUL's Internet presence.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on September 20, 2002 in Monroe, Louisiana.



Joel R. Willer